28921031.LOF

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 92-1031 CS
Controlled Substance Excise Tax
For Tax Period: 09/01/92

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Controlled Substance Excise Tax – Imposition

Authority: IC 6-7-3-5; IC 6-7-3-6; IC 6-7-3-13; IC 6-8.1-5-1; 45 I.A.C. 15-5-3; Bryant v. State of Indiana, 660 N.E.2d 290 (Ind. 1995)

Taxpayer protests the imposition of the controlled substance excise tax.

STATEMENT OF FACTS

Taxpayer was arrested by the Steuben County Sheriff's Department on September 1, 1992 for possession of cocaine. The Department assessed the controlled substance excise tax against the taxpayer on December 7, 1992. The assessment was based on 999.50 grams of cocaine. The Department received the taxpayer's protest of the assessment, by his representative, on December 17, 1992. Additional relevant facts will be provided below, as necessary.

I. Controlled Substance Excise Tax – Imposition

DISCUSSION

Indiana Code Section 6-7-3-5 states:

> The controlled substance excise tax is imposed on controlled substances that are:
> (1) delivered,
> (2) possessed, or
> (3) manufactured;
> in Indiana in violation of IC 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852.

Pursuant to Indiana Code Section 6-7-3-6:

"The amount of the controlled substance excise tax is determined by:
(1) the weight of the controlled substance. . ."

Taxpayer was arrested and the controlled substance excise tax was assessed based on 999.50 grams of cocaine.

Double Jeopardy

At the administrative hearing, taxpayer argued the proposed assessment of the controlled substance excise tax was not a final determination of the Department and did not constitute a jeopardy. Taxpayer cited Department Regulation 45 I.A.C. 15-5-3 which states in part:

> A taxpayer receiving a notice of proposed assessment shall have a right to protest the additional assessment and have a hearing of the facts and issues before a final determination is made by the department with respect to such proposed assessment.

However, pursuant to Indiana Code section 6-7-3-13:

> An assessment for the tax due under this chapter is considered a jeopardy assessment. The department shall demand immediate payment and take action to collect the tax due as provided by IC 6-8.1-5-3.

Chapter 3 (IC 6-7-3) is titled Controlled Substance Excise Tax. The Department finds the controlled substance excise tax assessment did constitute a jeopardy.

In the alternative, taxpayer argued the controlled substance excise tax violated the principles of double jeopardy as the taxpayer was also criminally prosecuted for the possession of cocaine.

Indiana's Supreme Court addressed this issue in Bryant v. State of Indiana, 660 N.E.2d 290 (Ind. 1995), and found a controlled substance excise tax assessment was a punishment for purposes of double jeopardy analysis. The Court went on to state that the jeopardy attaches when the Department serves the taxpayer with its Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand. In determining which

jeopardy is barred as the second jeopardy the relevant dates must be considered. Id. at 298, 299. Taxpayer was presented with the Record of Jeopardy Findings and Jeopardy Assessment Notice and Demand on December 7, 1992. At the administrative hearing, the taxpayer stated his plea bargain (concluding his criminal prosecution) was accepted by the court in March, 1994. The Department finds, in accordance to the law as stated in Bryant, that the tax assessment and jeopardy came first in time and was not barred by the principles of double jeopardy.

Timeliness

Taxpayer also argued the administrative hearing was not timely and cited IC 6-8.1-5-1(c) which reads:

> The notice shall state that the person has sixty (60) days from the date the notice is mailed to pay the assessment or to file a written protest. If the person files a protest and requires a hearing on the protest, the department shall:
>
> (1) set the hearing at the department's earliest convenient time; and
> (2) notify the person by United States mail of the time, date, and location of the hearing.

The administrative hearing was held on August 6, 1998. Taxpayer claimed the Department failed in it's duty by holding the hearing more than five years after the jeopardy assessment. Taxpayer claimed he could no longer locate witnesses and that a substantial amount of interest had accrued on the assessment due to the delay.

Taxpayer cited no authority which defined "earliest convenient time" or what the repercussions should be if the Department fails in that duty. Taxpayer believes the tax should be abated.

The Department, however, will not abate the controlled substance excise tax assessment. The Department finds the delay in the administrative hearings to have been reasonable and convenient given there were several issues regarding the controlled substance excise tax making their way through the court system. Upon a final ruling from the Court, the Department took action to schedule the administrative hearings at the earliest convenient times.

FINDING

Taxpayer's protest is denied.